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No. 93-1953

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

ANNAPOLIS ROAD,

Petitioner,

v.

ANNE ARUNDEL COUNTY, MARYLAND,

Respondent.

On Petition for Writ of Certiorari
To the Court of Special Appeals
Of the State of Maryland

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 13, 1994

34pp

RESTATEMENT OF QUESTIONS PRESENTED

1. Does the interlocutory decision of the Maryland Court of Special Appeals, an intermediate appellate court, constitute a final decision supporting further review by this Court pursuant to 28 U.S.C. 1257(a)?

2. Does the decision of the Maryland Court of Special Appeals that a local government in Maryland may place time, place and manner restrictions on sexually-oriented businesses such as adult film arcades ("peep shows") conflict with this Court's holding in Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931)?

3. Was the construction by the Maryland Court of Special Appeals of the adult film arcade licensing ordinance consistent with the holding of this Court in FW/PBS, Inc. v. Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d. 603 (1990) that such ordinances contain adequate procedural safeguards?

4. Did the injunctions prohibiting the unlicensed operation of Petitioner's unlicensed adult film arcade abridge rights secured under the First Amendment to the United States Constitution?

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTIONS PRESENTED. . . i

TABLE OF AUTHORITIES. iii

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT. 6

I. The Decision Of The Maryland Court Of Special Appeals Did Not Finally Resolve The Federal Claim, And The Federal Constitutional Issues Presented By The Certiorari Petition May Be Mooted Or Resolved In Further Proceedings On The Merits In The State Court. 7

II. The Trial And Appellate Courts Were Correct In Concluding That Anne Arundel County's Adult Film Arcade Ordinance Constitutes A Valid Time, Place And Manner Restriction On A Sexually-Oriented Business 8

III. The Maryland Court Of Special Appeals Properly Rejected The Petitioner's Argument That The Licensing Ordinance Conferred Unbridled Discretion On Administrative Officials. 10

IV. The Maryland Court Of Appeals Properly Held That The Injunctions Did Not Abridge The Rights Of The Petitioner Under The First Amendment 13

CONCLUSION 14

Respondent's Appendix A.1

28 U.S.C. §1257(a). A.1

Laws of Anne Arundel County Bill No. 68-91 . . . . . A.1

Annapolis Road, Ltd. v. Hagner, No. 91-1205, Slip op. (4th Cir. June 2, 1992). A.3

TABLE OF AUTHORITIES

Cases — Page

County Commissioners of Anne Arundel County v. English, 182 Md. 514, 35 A.2d 135 (1943) 8

City of Lakewood v. Plain Dealer, 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). 13

Forsyth County v. Nationalist Movement, 505 U.S. ____, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) 7

Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). 8, 9

Ocean City v. Purnell-Jarvis, Ltd., 86 Md. App. 390, 586 A.2d 816 (1991) 8

Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). 9

Vance v. Universal Amusement Company, 445 U.S. 308, 110 S.Ct. 1156, 63 L.Ed.2d 413 (1980). 9

Page

Constitutional Provisions, Statutes and Ordinances

Constitution of the United States, Amendment I. 5, 13

28 U.S.C. 1257 (a). 3

Annotated Code of Maryland, Courts and Judicial Proceedings Article, Section 12-303(3) 7

Anne Arundel County Code, Article 16, Section 2-104 10

Anne Arundel County Code, Article 16, Section 2-1105(a) . . 11

Laws of Anne Arundel County Bill 98-91 . . . . . 3, 6, 11, 12

Laws of Anne Arundel County Bill 68-91. . . . . 4, 5, 6

No. 93-1953

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ANNAPOLIS ROAD, LTD.,

Petitioner,

v.

ANNE ARUNDEL COUNTY, MARYLAND,

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To The Court of Special Appeals
Of The State of Maryland

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Anne Arundel County, Maryland, hereby opposes the petition for a writ of certiorari to review the judgment of the Court of Special Appeals of the State of Maryland.

STATEMENT OF THE CASE

Petitioner, Annapolis Road, Ltd., is a corporation which owns and operates an "adult" bookstore in Anne Arundel County, Maryland. In addition to the retail sale and rental of videotapes and the sale of periodicals, the bookstore contains nine booths designed for private, coin-operated viewing of videotapes. (Resp. Appendix at p. 5.) Respondent Anne Arundel County is a political subdivision of the State of Maryland.

On December 3, 1992 Anne M. Hatcher, Chief of Licensing for the Anne Arundel County Department of Inspections and Permits [now known as the Department of Planning and Code Enforcement], inspected the bookstore and discovered an adult film arcade ("peep show") operating without a County Adult Film Arcade (Class Y) license. (Pet. Appendix at p. 67.) The County filed suit in the Circuit Court for Anne Arundel County requesting ex parte, interlocutory, and final injunctive relief. (Pet. Appendix at pp. 35-42.)

First an ex parte injunction (temporary restraining order) and then an interlocutory injunction were issued by the Circuit Court for Anne Arundel County restraining operation of the adult film arcade without a license. (Pet. Appendix at pp. 50-60.) The injunctions do not affect the bookstore's activities other than the adult film arcade. (Pet. Appendix at p. 74.)

As permitted by the Maryland Rules, an immediate appeal was taken to the Maryland Court of Special Appeals contesting the issuance of the ex parte and interlocutory injunctions. (Pet. Appendix at p. 62.) The issuance of the injunctions was affirmed by the Maryland intermediate appellate court in an unreported decision under Annapolis Road, Ltd. v. Anne Arundel County, Maryland No. 134, September Term, 1993 (Md. Ct. Spec. App. November 3, 1993). (Pet. Appendix at pp. 63-90.) A petition for writ of certiorari before the Maryland Court of Appeals was denied by an unreported order dated March 9, 1994. (Pet. Appendix at p. 91.) The Petitioner asks for review of the judgment of the Court of Special Appeals by this Court pursuant to 28 U.S.C. 1257(a).

There has been no stay of the proceedings in the Circuit Court for Anne Arundel County, in which the Respondent seeks a final injunction preventing the Petitioner from operating an adult film arcade without a County license. The trial on the merits of the claim for a final injunction is scheduled for July 19, 1994, and the Petitioner bookstore has raised by answer to the complaint its challenge to Bill No. 98-91 on various constitutional grounds.

On June 15, 1993 Petitioner filed a separate action in the Circuit Court for Anne Arundel County for Anne Arundel County under Case No. C-93-04789 OL seeking a declaration that Bill No. 98-91 is unconstitutional on its face and as applied to the Petitioner. That matter also remains pending in the Circuit Court for

Anne Arundel County.

The decision of the Court of Special Appeals recites some of the history of this matter. That history includes prior litigation.

On July 15, 1991, Anne Arundel County Council Bill No. 68-91 was introduced before the Anne Arundel County Council. The purpose of Bill No. 68-91 was to impose a "moratorium" on the issuance of County amusement licenses for private film-viewing machines, popularly referred to as "peep shows". The legislation sought to halt the issuance of new or renewed licenses until specific standards for the location and operation of such devices could be promulgated. Bill No. 68-91 was signed into law on August 7, 1991, took effect the same day, and provided that the moratorium would remain in effect until December 1, 1991. (Pet. Appendix at p. 65.)

On July 29, 1991, Chief of Licensing Hatcher made her first inspection of the Petitioner's business. Hatcher notified Alan Stokes, the manager, that a County license was required to operate the private film-viewing machines on the premises, and gave him a copy of the license application form. (Pet. Appendix at p. 65.) Store manager Stokes testified that he voluntarily shut down the private film-viewing machines. Id.

On August 1, 1991, Petitioner filed applications for licenses for its private film-viewing machines under the law then in effect. (Pet. Appendix at p. 65.) The original filing was procedurally

incomplete, and the applications were returned. An August 6 resubmission was similarly incomplete. On August 7, 1991, the moratorium enacted by Bill No. 68-91 went into effect, and the County took no further action on the applications for licenses. (Id. at p. 66.)

On August 13, 1991, Petitioner and Stokes filed suit in the United States District Court for the District of Maryland under Annapolis Road, Ltd., et al. v. Anne Arundel County, Maryland, et al., Civil No. S 91-2271, alleging inter alia that the moratorium and the actions of Hatcher violated rights secured to them by the First Amendment. (Resp. Appendix at p. 4.) On September 11, 1991 the District Court entered an opinion and order dismissing the entire complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim. (Id. at p. 5.) The dismissal was affirmed on appeal by the United States Court of Appeals for the Fourth Circuit in Annapolis Road, Ltd. v. Hagner, No. 91-1205 (4th Cir. June 2, 1992) (per curiam), reh'g denied June 22, 1993. (Id. at p. 14.) The Fourth Circuit found that the bookstore's claim of prior restraint lacked validity, as the bookstore had failed to demonstrate any "apparent communicative interest" promoted by the display of films or videotapes in peep show booths which could not be promoted with equal success by the rental or sale of those films and tapes over the counter, activities unaffected by the moratorium. (Id. at pp. 10-11.)

On November 21, 1991 a second ordinance, Anne Arundel County Council Bill No. 98-91, went into effect. (Pet.

Appendix at p. 66.) This ordinance set new standards for licensing the film-viewing machines, which no longer were licensed individually, but were licensed collectively as an "adult film arcade." Id. The moratorium imposed by Bill No. 68-91 expired on December 1, 1991, and the Petitioner was free to reapply for an adult film arcade license under the standards enacted by Bill No. 98-91. Id.

The Petitioner elected not to file an application for an adult film arcade license. Instead, at some point in time Petitioner reopened its peep shows without the benefit of a license, and the events which lead to the issuance of the injunctions followed. (Pet. Appendix at p. 67.)

REASONS FOR DENYING THE WRIT

The writ of certiorari should be denied on the following grounds: 1) The decision below did not finally decide the federal issues, and these issues may be resolved or mooted at the trial on the merits and in any subsequent appeals in the Maryland courts; 2) the Respondent County's Adult Film Arcade ("peep show") licensing ordinance constitutes a time, place and manner restriction on a sexually-oriented business rather than a "prior restraint" on protected expression; 3) the Maryland Court of Special Appeals rejected a construction of County law which would have conferred broad discretion on administrative officials to deny applications for adult film arcade licenses; and 4) the Petitioner placed nothing in the record suggesting that the injunction inhibited its ability

to disseminate ideas to the public, as that part of the Petitioner's business which included the sale and rental of videotapes for off-premise use was unaffected by the injunctions.

I. The Decision Of The Maryland Court Of Special Appeals Did Not Finally Resolve The Federal Claim, And The Federal Constitutional Issues Presented By The Certiorari Petition May Be Mooted Or Resolved In Further Proceedings On The Merits In The State Court.

Petitioner seeks a writ of certiorari to review the decision of the Maryland Court of Special Appeals affirming ex parte and interlocutory injunctions issued by the Circuit Court for Anne Arundel County. Petitioner appealed the issuance of the injunctions pursuant to a Maryland statute which permits appeals from certain interlocutory orders, including orders granting or dissolving injunctions.[1] The case has returned to the Circuit Court for Anne Arundel County, where it awaits a trial on the merits of the Respondent's complaint for final injunctive relief.

One of Petitioner's central contentions is that the licensing fee imposed by the ordinance on adult film arcades is a content-based "tax" on speech in violation of Forsyth County v.

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[1] Annotated Code of Maryland, Courts and Judicial Proceedings Article, §12-303(3)(i).

Nationalist Movement, 505 U.S. ____, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). (Pet. at p. 12.) The Court of Special Appeals specifically declined to address this issue on its merits, based on Petitioner's inartful examination of the County's Chief of Licensing. (Pet. Appendix at p. 82.) Consequently, Petitioner will have an opportunity to revisit this matter at the trial on the merits.

Furthermore, the Court of Special Appeals invited the Petitioner to resolve the fee issue on state law grounds, which would render moot the federal question: The Court pointed out that, under well-settled Maryland law, courts may review a fee imposed by a regulatory measure to determine if the amount is reasonable and if it has a definite relation to the regulatory purpose. (Pet. Appendix at p. 84.) See County Commissioners of Anne Arundel County v. English, 182 Md. 514, 520, 35 A.2d 135, 138 (1943). If the amount of the fee exceeds the regulatory costs, the fee is invalid. See Ocean City v. Purnell-Jarvis, Ltd., 86 Md.App. 390, 404-405, 586 A.2d 816, 823 (1991).

II. The Trial And Appellate Courts Were Correct In Concluding That Anne Arundel County's Adult Film Arcade Ordinance Constitutes A Valid Time, Place And Manner Restriction On A Sexually-Oriented Business.

Petitioner describes the licensing ordinance as a prior restraint on expression rendered unconstitutional by Near v. Minnesota, 283 U.S. 697, 51 S.Ct.

625, 75 L.Ed. 1357 (1931) and its progeny. (Pet. at p. 6.) This particular line of attack misses the mark entirely.

The licensing ordinance at issue is a time, place, and manner regulation of one type of sexually-oriented business. The Respondent concedes that if the film arcade was devoted exclusively to the exhibition of films which did not depict the specified sexual activities, a license would not be required.

It is no longer a novel idea that local governments may impose certain content-neutral restrictions on the location and operation of sexually-oriented businesses such as adult theaters and peep shows. See, e.g., Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). While the position which the Petitioner asks this Court to adopt is not immediately apparent, it is clear that the licensing ordinance at issue does not represent the general suppression or blanket censorship of expression proscribed in Near v. Minnesota, Vance v. Universal Amusement Company, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980) and the related cases cited by the Petitioner. As described by the Maryland Court of Special Appeals:

> The ordinance focuses on requirements pertaining to one particular manner of dissemination, viewing booths located on commercial premises, rather than restriction of all adult sexually explicit material available for distribution.

(Pet. Appendix at p. 73.) (Emphasis in original).

III. The Maryland Court Of Special Appeals Properly Rejected The Petitioner's Argument That The Licensing Ordinance Conferred Unbridled Discretion On Administrative Officials.

Petitioner alleges that the licensing ordinance fails to establish specific and reasonable guidelines and criteria governing the issuance or denial of an adult film arcade license by the Respondent. (Pet. at pp. 8-10.) Petitioner urges on this Court a construction of the ordinance which was rejected by the Maryland Court of Special Appeals.

Petitioner relies heavily on general language in the Anne Arundel County Code which predates enactment of the adult film arcade licensing ordinance as evidence of the purported "unbridled discretion." In particular, Petitioner cites Article 16, §2-104 of the County Code, which confers on the Anne Arundel County Department of Planning and Code Enforcement the authority to deny an amusement license if the "operation of the devices at the proposed premises will create a nuisance or will be detrimental to the peace and welfare of the community . . . "[2] (Pet. Appendix at p. 6.)

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[2]A number of different amusement "devices" are licensed under Article 16 of the County Code, of which Adult Film Arcades are only one variety.

Concluding that the general authority of the Department of Planning and Code Enforcement to grant or deny various amusement licenses is limited by the specific provisions of the adult film arcade ordinance, the Court of Special Appeals noted that the licensing official's discretion to deny an adult film arcade license is curtailed sharply under Bill No. 98-91. (Pet. Appendix at p. 79.) In particular, Article 16, §2-1105(a), as enacted by Bill No. 98-91, mandates that: "The Director [of Planning and Code Enforcement] shall issue a Class Y license if the applicant meets the requirements of this subtitle."[3] (Pet. Appendix at pp. 18, 79.) (Emphasis added.)

The Court of Special Appeals also observed that the ordinance contained provisions assuring "expeditious review" of administrative decisions affecting adult film arcade licenses. (Pet. Appendix at pp. 77, 80.) The Court properly held that the general authority of the Director of Planning and Code Enforcement was constrained by the specific provisions of the adult film arcade ordinance, which included specific and reasonable criteria governing the issuance or denial of an adult film arcade license by the County.

The record before the Court of Special Appeals included the transcript of deposition testimony by Chief of Licensing

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[3]The applicable subtitle is Subtitle 11, which deals only with Class Y (adult film arcade) licenses.

Hatcher in which she described how her agency generally determined whether an amusement device would be "detrimental to the peace and welfare of the community." (Pet. Appendix at p. 79.) In addition to reiterating the observation by the Court of Special Appeals that Hatcher's discretion is limited by the plain language of the ordinance, Respondent also points out that Petitioner is in a position only to raise a challenge to the facial validity of the ordinance; Petitioner has not applied for an adult film arcade license under the ordinance enacted in 1991.[4] (Pet. Appendix at p. 67.) Any conjecture as to how Hatcher may implement the new Class Y licensing requirements is immaterial.

IV. The Maryland Court Of Appeals Properly Held That The Injunctions Did Not Abridge The Rights Of The Petitioner Under The First Amendment.

The Court of Special Appeals also found that the injunctions did not abridge the First Amendment rights of the

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[4]Petitioner's historical references to the "private film-viewing machine" licensing ordinance in effect prior to the enactment of Bill No. 98-91 have no bearing on the instant case. The Respondent admits that no licenses were issued under the ordinance in effect from 1977 through 1991. As described by the Fourth Circuit in the prior litigation, Bill No. 98-91 is substantially different from the licensing ordinance previously in effect. (Resp. Appendix at p. 8.)

Petitioner, on the basis that the injunction left the Petitioner with "reasonable alternative means of communication": The Petitioner failed to produce any evidence that the type of speech promoted by the adult film arcade differed from that contained in the videotapes sold and rented at the bookstore. (Pet. Appendix at p. 74.) The Court of Special Appeals adopted the reasoning of the United States Court of Appeals for the Fourth Circuit, which had held that the moratorium ordinance imposed by Bill No. 68-91 did not constitute a prior restraint because the Petitioner had failed to suggest an "apparent communicative interest" promoted by the peep show machines which could not be promoted with equal success by the rental or sale of the same videotapes. (Id. at pp. 74-75.) Paraphrasing the language of this Court, it may be that the First Amendment's protection of expression is implicated by the injunctions, but the Petitioner has placed nothing in the record to suggest that it is abridged. See, e.g. City of Lakewood v. Plain Dealer, 486 U.S. 750, 769, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for write of certiorari be denied.

Respectfully submitted,

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APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

28 U.S.C. §1257(a)

Final judgements or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

LAWS OF ANNE ARUNDEL COUNTY, MARYLAND
Bill No. 68-91

AN EMERGENCY ORDINANCE concerning: Licenses and Permits - Moratorium

FOR the purpose of establishing a moratorium on the issuance or renewal of Class Y licenses

WHEREAS, Article 16, Title 2, Subtitle 11 of the Anne Arundel County Code provides for the issuance of a Class Y license for film-viewing machines; and

WHEREAS, the Code does not specify any standards for the location, operation, or regulation of these facilities; and

WHEREAS, the County Council believes that there should be guidelines in place to assist the Director of Inspections and Permits in the issuance of Class Y licenses; and

WHEREAS, the County Council further believes that a review of the law regulating these licenses should be undertaken in order to determine if it provides guidelines that suitably address the interests of the citizens of Anne Arundel County; and

WHEREAS, the County Council further believes that these guidelines and standards should be enacted prior to the issuance or renewal of any additional Class Y licenses; now, therefore,

SECTION 1. Be it further enacted by the County Council of Anne Arundel County, Maryland, That the Department of Inspections and Permits may not issue or renew a Class Y license until December 1, 1991.

SECTION 2. And be it further enacted, That this Ordinance is hereby declared to be an emergency ordinance and necessary for the immediate preservation of the public peace, health, safety, welfare, and property, and being passed by the affirmative vote of five members of the County Council, the same shall take effect from the date it becomes law.

APPROVED AND ENACTED: August 7, 1991

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANNAPOLIS ROAD, LIMITED, A DELAWARE CORPORATION; ALAN STOKES,

Plaintiffs-Appellants,

v.

DARRYL R. HAGNER, Detective, Anne Arundel County Police; ROBERT P. RUSSELL, Chief, Anne Arundel County Police; LEROY JONAS, Director, Department of Inspections and Permits; ANNE M. HATCHER, License Administrator; ROBERT R. NEALL; ANNE ARUNDEL COUNTY, MARYLAND, a Body Politic by Charter,

Defendants-Appellees.

No. 91-1205

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge.
(CA-91-2271-S)

Argued: April 8, 1992

Decided: June 2, 1992

Before ERVIN, Chief Judge, MURNAGHAN, Circuit Judge, and TILLEY, United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: William Edward Seekford, Towson, Maryland, for Appellants. David Alan Plymyer, Deputy County Attorney, ANNE ARUNDEL COUNTY OFFICE OF LAW, Annapolis, Maryland, for Appellees. **ON BRIEF:** Judson P. Garrett, Jr., County Attorney, ANNE ARUNDEL COUNTY OFFICE OF LAW, Annapolis, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

I.

Annapolis Road, Ltd., a corporation which owns and operates an "adult" bookstore and coin operated video facility, and Alan Stokes, the manager of the bookstore ("appellants"), filed claims pursuant to 42 U.S.C. § 1983 and § 1988 against Anne Arundel County, Maryland, and certain county officials ("appellees"), alleging that the application and threatened application to them by appellees of various statutes had violated or would violate their First and Fourth Amendment rights. The first two statutes were county ordinances, one involving licensing criteria, and the other imposing a six-month moratorium on future licenses. The other pair of statutes were statutes of the state of Maryland prohibiting the display or depiction of sexual conduct for advertising purposes. Appellants alleged that the statutes, or the threatened application of them, constituted prior restraint of their First Amendment rights, and denial, suppression and abridgment of other constitutional protections.

Appellants filed their claim on August 13, 1991. Appellees filed a response alleging a failure on the part of appellants to state a claim

upon which relief could be granted. On September 11, 1991, the district court entered an opinion and order dismissing the entire complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Appellants filed a timely notice of appeal.

II.

Appellants own and operate an "adult" bookstore which retails books, magazines, newspapers, and videos which include pictures displaying explicit sexual acts on their covers. In addition, the store contains nine single patron coin-operated video booths, better known as "peep-show" booths.

On May 11, 1984, appellee Darryl Hagner, a detective with the Anne Arundel County Police Department, seized a number of books, magazines and films from the store pursuant to Article 27, Section 416-D of the Maryland Code, which prohibits the public display of depictions of certain sexual acts. Appellants were convicted of various counts of displaying those materials, but the bookstore remained in business.

On July 15, 1991, Bill #68-91, a bill to impose a moratorium on the issuance of amusement licenses ("Class Y" licenses) for private viewing machines (the peep-shows booths), was introduced before the Anne Arundel County Council. The reason for the codification of Bill #68-91 was the county's belief that the existing amusement licensing ordinance, §§ 2-1101 - 2-1110 of Article 16 of the Anne Arundel County Code, were insufficiently specific as to location and operation standards for peep-show parlors. Bill #68-91 sought to halt the issuance of new or renewed licenses until such standards could be promulgated. The Bill was signed on August 7, 1991, and took effect that same day, and was set to remain in effect until December 1, 1991.

Previously, on July 29, 1991, appellee Hagner and appellee Anne Hatcher, an officer of the County Department of Inspection and Permits, made an inspection of appellants' bookstore. The two found peep-show machines that were not covered by Class Y licenses. Hatcher gave an application for Class Y licenses to appellant Stokes.

In an attempt to avoid further trouble with the law, appellants closed the bookstore on August 1, 1991, and completed and filed applications for licenses for their peep-show machines. The original filing was procedurally incomplete, and the application was returned for resubmission. The August 6 resubmission was similarly incomplete. On August 7, 1991, Bill #68-91, the "moratorium" ordinance, took effect, and pursuant to it, the county took no further action on appellants' application for licenses.

On November 21, 1991, Bill #98-91, a measure which set the new standards for amusement licenses sought in Bill #68-91, went into effect. Appellants were soon free to apply for a new license under Bill #98-91, because the moratorium under Bill #68-91 expired as of December 1, 1991.

Appellants sought declaratory and injunctive relief based on various alleged causes of action. First, appellants alleged that Article 27, Sections 416, and 418[1] of the Maryland Code were unconstitutionally enforced or threatened to be enforced by County officials. Specifically, appellants contended that individual appellees under color of the State law had, in 1984, sought and obtained illegal search warrants to seize material, and now threatened to do so again.

Second, appellants have argued that the new Class Y licensing provision, enacted pursuant to Bill #98-91, is unconstitutional as a prior restraint on speech. Additionally, appellants allege that the activities of County officials constituted violations of 42 U.S.C. § 1983 because they caused a violation of appellants' clearly established constitutional and statutory rights and those of their patrons and employees.

The district court on September 11, 1991, dismissed all claims made by appellants. In so doing, the court ruled that: 1) appellants had not demonstrated, even by unilaterally closing their store, a sufficient cause for declaratory relief as against the nebulous threat of seizure and/or prosecution in the absence of a showing of a present objective harm or threat of some future harm real enough to justify declaratory relief; 2) there was no justiciable cause of action regarding the Class

[1]Section 418 is a restriction on the sale of "obscene" material.

Y licensing ordinance, because it was not yet in effect;[2] 3) there was no justification for any claim of damages by appellants based on a single lawful inspection by County officials; 4) the restriction set out by the moratorium provision was not a prior restraint as it constituted a permissible time, place and manner restriction on sexually explicit coin operated video machines; and 5) the moratorium provision did not constitute a due process violation justifying a constitutional challenge.

Aspects of the district court's ruling have been mooted by the expiring of Bill #68-91 (the "moratorium" provision) and the codification of Bill #98-91 (the new Class Y licensing standards provisions).

III.

A. *Mootness of Licensing Claim*

Anne Arundel County Bill #98-91 repealed the provisions of Article 16, §§ 2-1101 through 2-1110 effective on November 21, 1991. Those provisions had governed the application and granting requirements for Class Y licenses. Appellees have contended that appellants' claims regarding county licensing ordinances are mooted by the reversal and replacement of §§ 2-1101 — 2-1110. Although appellants have cited deficiencies in statutory provisions which remain on the books following the enactment of Bill #98-91, appellees' contention that the relevant provisions of §§ 2201 — 2110 have been substantially repealed is correct.

The basis of appellants' claims that the previous licensing statute constituted a violation of their constitutional rights was their assertion that the provision assigned too much discretionary power to the Licensing Director, and did not provide statutory guidelines or standards to govern his or her determinations. The new licensing provisions, as altered by §§ 2-1105, 1107, 1108, 1109, and 1110 of Bill #98-61, however, provide significant additional statutory guidelines

[2]At the time of its ruling the district court was correct as to the effectiveness of the Class Y licensing ordinance. But as of November 21, 1991, a new ordinance has been in effect.

to govern the Director's activity, and to identify the prohibited acts of licensees. The new guidelines include: an additional time limit for issuance determinations by the Director; a requirement that the Director give reasons in writing for any negative issuance determination; specific organizational, personnel and equipment requirements for licensees; specific guidelines governing license renewal and revocation; a more specific demarcation of prohibited acts of licensees; and a right to immediate appeal for unsuccessful applicants for renewal.

The new licensing statute thus provides substantially different requirements than those set out in the previous statute, upon which appellants' claim is based. In *Maryland Highway Contractors v. State of Maryland*, 933 F.2d 1246 (4th Cir. 1991), we ruled that when a statute that forms the basis for a complaint is repealed and replaced by another statute, particularly one that seeks to respond to the defects in the previous statute at issue in the complaint, the revision of the original statue has the effect of rendering the complaint moot. *Id.* at 1449-1450.

Accordingly, the revision of the Class Y licensing provision, providing significant additional limitations on discretionary activity by the Director, and providing specific standards to govern licensing activity, moots appellants' claims involving the enforcement and threatened enforcement of the previous statute.

B. *The Moratorium*

There are, however, issues not mooted by the repeal of the original licensing statute. The moratorium provision of Bill #68-91 was the statutory provision that affected appellants' license rights in the present case. Appellants were denied their application for a Class Y license not because of the provisions of the previous licensing statute, but because of the edict of Bill #68-91 which set up a moratorium on issuing licenses which took effect one day prior to appellants' procedurally sufficient application. Accordingly, we must address the issue of the County's failure to grant the Class Y license, and whether the moratorium provided for in Bill #68-91 constituted a basis for a § 1983 claim by appellants.

Two allegations must be made out to state a cause of action for a § 1983 claim. "First, the plaintiff must allege that some person has

deprived him of federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The second prong of the test is met here, in that the government action in question, the moratorium required by the County statute, arises as under the color of territorial law. *See West v. Atkins*, 487 U.S. 42, 49 (1988) (when an official exercises power which is possessed by virtue of state law, "color of state law" requirement is met). The only remaining issue, therefore, is whether appellants have alleged harm which constitutes deprivation of a federal right.

The only apparent direct discussion of the propriety of the County's moratorium in appellants' brief on appeal, is their assertion, supported by precedent, that there is a presumption that their rights to sell printed material and to exhibit film, and the rights of others similarly situated, are protected by the First and Fourteenth Amendment. Appellants' assertion is indisputable. The fact that sexually explicit material may engender negative response from the majority of a legislature or community does not serve to withdraw all First Amendment protections from its purveyors. It is also clear, however, that a state or local entity has the authority to promulgate reasonable regulations regarding the sale of such material, as long as the government action does not place a prior restraint, undue burden, or harmful chilling effect on a selling party's freedom of expression.

Appellees contend that no such burden or restraint was occasioned by the moratorium on issuance of new Class Y licenses. As stated previously, appellants' bookstore provided two relatively distinct services to its customers. First, it made available for sale or rent pictorial and video explicit sexual material that a customer could transport out of the store. Additionally, the store had on site "peep-show" machines that provided the viewer, after inserting coins, the opportunity to view sexually explicit material on the store's premises. The Class Y license requirement extended to only the latter service, and the lack of the license did not restrict, in any way, appellants' ability to market or otherwise provide its material in any other manner than through the "peep show" forum. Accordingly, the County moratorium provision did not involve a direct content-based restriction on all of the speech promoted by appellants, but merely imposed a limited restriction on

the time or manner through which the sexually explicit material could be presented to the public.

In *Young v. American Mini Theaters*, 427 U.S. 50 (1976), the Supreme Court addressed the issue of the potential prior restraint effect of state licensing and zoning regulations which restricted the commercial projection of sexually explicit films. In determining that the regulations did not constitute an unreasonable restraint on free speech, the Court opined that:

> The city's general zoning laws require all motion picture theaters to satisfy certain locational as well as other requirements; we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments . . . The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances . . . *we are also persuaded that . . . [the] restriction does not, in itself, create an impermissible restraint on protected communication.*

Id. at 62 (emphasis added).

The point highlighted by the Court in *Young*, and of relevance in the present case, is that the facility of communication, and not communication in any particular form, is the focus of First Amendment protection. To the extent that appellants were able to show that there was an essential communicative element provided by the "peep-show" machines that could not be replaced by other material available in the store, its claim of prior restraint would perhaps have significant validity. Yet here there is no apparent communicative interest, and appellants fail to suggest one, promoted by the peep show booths that could not be promoted with equal success by the renting or sale of other explicit material.[3] *See also Renton v. Playtime Theaters, Inc.*,

[3]Appellants have supported their claim that the restriction on its in-house showing of videos constituted a prior restraint with irrelevant statistics about loss of profit. The fact that appellants are likely to become significantly

475 U.S. 41, 53 (1986) (allowing zoning restriction on adult theaters as long as the restrictions provide "reasonable alternative avenues of communication ..." for the explicit material), and *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986) (allowing the closing of a bookstore, and ruling that the potential burden on First Amendment rights was "mitigated by the fact that respondents remain free to sell the same materials at another location.").

In addition to the foregoing, it must be reasserted that the moratorium provision at issue here served to restrict appellants' expression for less than four months, for the specific purpose of promulgating more specific guidelines for the issuance and review of Class Y licenses, a necessity highlighted in appellants' own argument. Appellants, after the approximately four month moratorium expired, were free to re-apply for a Class Y license, under the new licensing requirements, and resume their commercial use of peep-show booths.[4]

The limited restriction on the manner of communicating sexually explicit material imposed by the moratorium ordinance did not impermissibly restrict the First Amendment rights of appellants justifying a conclusion that their federal rights were violated. Accordingly, the district court properly determined that appellant's § 1983 complaint concerning the moratorium failed to state a claim upon which relief could be granted.

C. *Enforcement of Anti-Obscenity Statutes*

Appellants have claimed that they are threatened with the unfair application of the State's anti-obscenity statutes.[5] They did not claim

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more wealthy through the use of the peep show booths, than merely from dissemination of similar material in different forms, does not inform adjudication of First Amendment issues. "The inquiry for First Amendment purposes is not concerned with economic impact." *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54 (1986).

[4]While not relevant here, the shortness of the four month moratorium enhanced its reasonableness and rebutted any argument of unfairness or vindictiveness.

[5]Annotated Code of Maryland, Article 27 §§ 416D and 418.

that the statutes themselves are invalid, but asserted that Officer Hagner acted arbitrarily in enforcing the statutes in his seizure in 1984, and that he has recently made threats suggesting that he will take such unjustified discretionary action again in the future.[6]

In *Ellis v. Dyson*, 421 U.S. 426, 432 (1975), the Supreme Court, citing its opinion in *Steffel v. Thompson*, 415 U.S. 452 (1974), held that "federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied." In *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 302 (1979) (citation omitted), the Court held that "when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not first expose himself to actual arrest or prosecution to be entitled to challenge the statute." The question on appeal, therefore, is whether the appellants have indicated a genuine, non-imaginary or non-speculative threat that the statutes in question will be enforced in an unconstitutional manner.

A recent decision by a Maryland appellate court directly addressed the type of search and seizure performed by Officer Hagner in 1984 in appellants' store pursuant to § 416D, and concluded that "[t]he Fourth Amendment does not permit the issuance of a warrant that leaves it entirely to the discretion of the officers conducting the search to decide what items are obscene and are therefore subject to seizure." *Randall Book Corp v. State*, 497 A.2d 1174, 1180 (Md.App. 1985). Subsequent to the decision in *Randall*, a police officer is not imbued with the kind of arbitrary authority allegedly exercised by Hagner in 1984, when he determined the propriety of displayed material, and feared by appellants in the future. Prior to *Randall*, concern about a repeat of the arbitrary seizure carried out in 1984 might have been considered something other than speculative. But given the Maryland Court of Appeals specific indication of the proper procedure, a con-

[6]Specifically, the officer was alleged to have commented during his recent inspection of the bookstore premises: "I see you have some of those materials that aren't supposed to be here."

clusion that the past, now disfavored, activity would be likely to be repeated is highly speculative.

Given the extreme unlikelihood that the feared unconstitutional enforcement of the State statute alleged by appellants will occur, the district court properly determined that appellants did not have standing to bring their claims for relief concerning the State statutes.

D. *Other 1983 Claims*

Section 1983 liability for a municipality, like Anne Arundel County in the present case, only applies "where the municipality *itself* causes the constitutional violation at issue. *Respondeat superior* or vicarious liability will not attach under § 1983. It is only when the execution of the government's policy or custom inflicts the injury that the municipality may be held liable under § 1983." *Canton v. Harris*, 489 U.S. 378, 385 (1989) (citations omitted).[7] The only factual precedent provided by appellants to support its complaint against the County is the isolated activity of one police officer seven years in the past. Such an isolated action is clearly insufficient to support a § 1983 claim against the County. Much more significant and general activity on the part of a police force has been held not to provide basis or a § 1983 claim, because such activity failed to indicate "deliberate indifference to the rights of persons with whom the police come into contact" on the part of the police force as a whole. *Id.* at 388.

Accordingly, the district court properly dismissed appellants' claim against the County and the County officials.[8] The district court's dis-

[7]Appellants brought additional charges against five appellees in their official capacity. Such suits are adjudicated within the same principles of law that apply to suits against a municipality itself. *Monell v. Department of Social Services of New York*, 436 U.S. 658, 690-92 (1978); *Giancola v. State of West Virginia Dept. of Public Safety*, 830 F.2d 547, 550 (4th Cir. 1987). Accordingly the officers will not be held liable in their official capacity unless the municipality is found to be liable.

[8]Appellant makes additional claims against Appellees Hagner and Hatcher personally. The claim against Hagner provides no factual support for a conclusion that he participated in any violation of a federal right enjoyed by appellant since the seizure incident in 1984. Appellants have exhausted any

missal of appellants' claims in the present case should be affirmed.

AFFIRMED

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claim regarding that incident in an unsuccessful past federal action. The claim against appellee Hatcher focuses on her letter sent to appellants denying their license on August 8, 1991, because of the imposition of the moratorium. But since we have concluded that the moratorium and its application did not violate appellants' constitutional rights, it is clear that Hatcher can not be held liable for a constitutional violation in participating in the application of the moratorium.